Said Dharmalingam bin Abdullah (formerly known as Dharmalingam a/l Ranganathan) v Malayan Breweries (Malaya) Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-470 OF 1993
EDGAR JOSEPH JR, MOHD DZAIDDIN FCJJ AND ABU MANSOR JCA
15 NOVEMBER 1996

Labour Law *— Employment — Dismissal — Pre-dismissal enquiry at domestic level — Attempted theft — Whether rules of natural justice applied to dismissal procedure — Whether employee should have been given opportunity to mitigate finding of guilt — Whether denial of right to 'due inquiry' — Right to make plea would have been useless formality — Employment Act 1955 s 14(1)*

The appellant ('the Employee') was employed by the respondent ('the Employer') as a wort cooler operator at its brewery. By letter dated 21 October 1988, the Employee was suspended from duties for two weeks pending an investigation into an allegation that he had attempted to steal 30 bottles of cordials and a bottle of stout from the brewery. On 4 November 1988, a domestic enquiry was held in which the Employee appeared, assisted by a union representative, before a panel of enquiry ('the Panel') which comprised four senior executives of the Employer. Witnesses were called by a prosecuting officer and their evidence clearly incriminated the Employee. The Employee claimed that he was framed. The Panel found the Employee guilty of all charges and, without inviting the Employee to make a plea in mitigation, recommended to the brewery manager that the Employee be dismissed with immediate effect. Thereupon, the brewery manager dismissed the Employee with immediate effect. The Employee issued a writ in the High Court seeking a declaration that his dismissal was in breach of the rules of natural justice. The trial judge held that the Employer had done all that was necessary to ensure a fair hearing at the enquiry and that there was no breach of the rules of natural justice. On appeal, the main issue was whether a contractual servant who is an 'employee' within the meaning of the Employment Act 1955 ('the Act') was entitled to have his dismissal declared null and void if the procedural safeguards provided by law had not been observed at a pre-dismissal enquiry at the domestic level. The Employee's main argument was that, before being punished with dismissal, he had not been given the opportunity to make a submission in mitigation and that this was a breach of the *audi alteram partem* rule of natural justice. Under the Employer's disciplinary guidelines, attempted theft was a serious offence, the penalty for which upon finding of guilt was dismissal.

Held, dismissing the appeal:

(1) When, as in the present case, a claimant is an employee within the meaning of the Act, he has by s 14(1) thereof a statutory

right to 'due enquiry' by his employer before being dismissed. In examining whether an employee has been dismissed without just cause or excuse, it was correct to examine the decision not just for substance but for process as well (see p 363F–G); *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor* [1988] 1 MLJ 111 and *Wong Yuen Hock v Sykt Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753 distinguished.

(2) Where an employee was denied the opportunity to make a plea in mitigation before sentencing by a domestic body, this amounted to a partial denial of the employee's right to 'due inquiry' under s 14 of the Act. 'Due inquiry' for the purposes of s 14 of the Act includes the right to make representations against the punishment proposed as a result of adverse findings by a domestic body. An employee should not only have the opportunity to present arguments on 'liability' but also in mitigation of penalty. More particularly, any discretion as to punishment to be visited on the affected party in itself should preclude relaxation of the requirement of a fair hearing, which includes being afforded the opportunity to make a plea in mitigation (see pp 363I and 365E–F); *Siggs and Chapman (Contractors) Ltd v Knight* [1984] 13 IRLR 83 followed.

(3) Different considerations would arise if statutory or contractual provisions required in clear terms that a specified punishment was mandatory upon proof of guilt. In such a situation, denial of an opportunity to be heard would occasion no prejudice to the affected party since the employer would have no discretion but to dismiss. In the present case, no other punishment was possible, given the circumstances of the case. Therefore, it would have been a useless formality to have accorded the Employee the right to make a plea in mitigation as the penalty would have been the same even if that right had been exercised (see p 365F–G, H–I); *Malloch v Aberdeen Corp* [1971] 1 WLR 1578 followed.

[Bahasa Malaysia summary

Perayu ('Pekerja tersebut') telah digaji oleh penentang ('Majikan tersebut') sebagai seorang operator 'wort cooler' di kilang birnya. Melalui surat bertarikh 21 Oktober 1988, Pekerja tersebut digantung kerja selama dua minggu sementara menunggu penyelesaian siasatan ke atas pengataan bahawa dia telah cuba mencuri 30 botol kordial dan sebotol stout dari kilang bir. Pada 4 November 1988, suatu siasatan domestik telah diadakan di mana Pekerja tersebut hadir, dibantu oleh seorang wakil kesatuan, di hadapan sebuah panel siasatan ('Panel tersebut') yang terdiri daripada empat orang eksekutif kanan Majikan tersebut. Saksi telah dipanggil oleh seorang pegawai pendakwa dan keterangan mereka jelas membabitkan Pekerja tersebut. Pekerja tersebut mendakwa bahawa dia telah dianiayai. Panel tersebut mendapati Pekerja tersebut bersalah atas semua pertuduhan dan, tanpa menjemput Pekerja tersebut untuk membuat rayuan dalam

peringanan, mengesyorkan kepada pengurus kilang bir bahawa Pekerja tersebut patut dipecat dengan segera. Ekoran itu, pengurus kilang bir memecat Pekerja tersebut dengan segera. Pekerja tersebut mengeluarkan suatu writ di Mahkamah Tinggi memohon perisytiharan bahawa pemecatannya melanggar rukun keadilan asasi. Hakim perbicaraan memutuskan bahawa Majikan tersebut telah melakukan segala yang perlu bagi memastikan pembicaraan yang adil di siasatan dan bahawa tiadanya perlanggaran rukun keadilan asasi. Atas rayuan, isu utama adalah sama ada seorang kakitangan kontraktual yang merupakan seorang 'pekerja' dalam maksud Akta Pekerjaan 1955 ('Akta tersebut') berhak kepada perisytiharan bahawa pemecatannya adalah batal dan tak sah jika perlindungan prosedur yang diperuntukkan oleh undang-undang tidak dipatuhi di siasatan pra-pemecatan di tahap domestik. Hujah utama Pekerja tersebut adalah bahawa, sebelum dihukum dengan pemecatan, dia tidak diberikan peluang untuk membuat hujah dalam peringanan dan bahawa ini merupakan suatu perlanggaran rukun *audi alteram partem* keadilan asasi. Di bawah garis panduan tatatertib Majikan tersebut, percubaan mencuri adalah satu kesalahan serius, dan penalti jika didapati bersalah adalah pemecatan.

Diputuskan, menolak rayuan:

(1) Di mana, seperti dalam kes ini, suatu pihak menuntut adalah pekerja dalam maksud Akta tersebut, melalui s 14(1) dia mempunyai suatu hak statutori kepada 'siasatan wajar' oleh majikannya sebelum dipecat. Dalam memeriksa sama ada seorang pekerja telah dipecat tanpa sebab atau alasan yang munasabah, adalah betul untuk meneliti keputusan bukan sahaja untuk kekukuhan tetapi juga untuk proses (lihat ms 363F–G); *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor* [1988] 1 MLJ 111 dan *Wong Yuen Hock v Sykt Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753 dibeza.

(2) Di mana seorang pekerja dinafikan peluang untuk membuat rayuan dalam peringanan sebelum dijatuhkan hukuman oleh sebuah badan domestik, ini sama seperti penafian separa hak pekerja kepada 'siasatan wajar' di bawah s 14 Akta tersebut. 'Siasatan wajar' untuk tujuan s 14 Akta tersebut melingkungi hak untuk membuat representasi terhadap hukuman yang dicadangkan akibat daripada pendapat bertentangan oleh sebuah badan domestik. Seseorang pekerja bukan sahaja harus mempunyai peluang untuk mengemukakan hujah atas 'liabiliti' tetapi juga peringanan penalti. Lebih khususnya, apa-apa budi bicara ke atas hukuman yang patut dijatuhkan pada pihak berkenaan haruslah mengecualikan pengenduran keperluan pembicaraan yang adil, yang meliputi peluang untuk membuat rayuan dalam peringanan (lihat ms 363I dan 365E–F); *Siggs and Chapman (Contractors) Ltd v Knight* [1984] 13 IRLR 83 diikut.

(3) Pertimbangan lain timbul jika peruntukan statutori atau kontraktual menghendaki dalam terma yang jelas bahawa

hukuman yang ditetapkan adalah mandatori jika kesalahan dibuktikan. Dalam keadaan begitu, penafian peluang untuk didengar tidak akan menyebabkan prasangka kepada pihak berkenaan oleh kerana majikan tidak mempunyai apa-apa budi bicara selain daripada penolakan. Dalam kes ini, tiada hukuman lain adalah wajar, memandangkan keadaan kes. Oleh itu, adalah suatu formaliti yang tidak bermanfaat untuk memberikan Pekerja tersebut hak untuk membuat rayuan dalam peringanan oleh kerana penalti adalah sama jika pun hak itu telah dilaksanakan (lihat ms 365F–G, H–I); *Malloch v Aberdeen Corp* [1971] 1 WLR 1578 diikut.]

Notes

For cases on termination of employment, see 8 Mallal's Digest (4th Ed, 1996 Reissue) paras 790–835.

Cases referred to

102 Social Club and Institute Ltd v Bickerton (1977) ICR 911 (refd)
Breen v Amalgamated Engineering Union & Ors [1971] 2 QB 175 (refd)
British Leyland UK Ltd v Swift [1981] 10 IRLR 91 (refd)
Chief Constable of North Wales Police v Evans [1982] 3 All ER 141 (refd)
Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor [1988] 1 MLJ 111 (distd)
General Medical Council v Spackman [1943] AC 627 (refd)
Glynn v Keele University & Anor [1971] 2 All ER 89 (refd)
Khanum v Mid-Glamorgan Area Health Authority [1979] ICR 40 (refd)
Malloch v Aberdeen Corp [1971] 1 WLR 1578 (folld)
Nakkuda Ali v MF de S Jayaratne [1951] AC 66 (refd)
R v BBC ex p Lavelle [1982] 11 IRLR 404 (refd)
Ridge v Baldwin & Ors [1964] AC 40 (folld)
Siggs and Chapman (Contractors) Ltd v Knight [1984] 13 IRLR 83 (folld)
Stevenson v United Road Transport Union [1977] 2 All ER 941 (refd)
Vidyodaya University of Ceylon & Ors v Silva [1964] 3 All ER 865 (refd)
Ward v Bradford Corp & Ors (1972) 70 LGR 27(refd)
Wong Yuen Hock v Sykt Hong Leong Assurance Sdn Bhd [1995] 2 MLJ 753 (distd)
Yates v Lancashire County Council (1974) 10 ITR 20 (refd)

Legislation referred to

Employment Act 1955 s 14(1)
Industrial Relations Act 1967 s 30(5A)

Appeal from: Civil Appeal No R2–22–11–90 (High Court, Kuala Lumpur)

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the appellant. A

P Nallini (*Skrine & Co*) for the respondent.

Cur Adv Vult

Edgar Joseph Jr FCJ (delivering the judgment of the court): In this judgment, it would be more convenient if we referred to the appellant and the respondent as 'the Employee' and 'the Employer' respectively. B

The essential facts may be shortly stated and are these:

The Employee had been employed by the Employer as a wort cooler operator at its brewery situated at Jalan Foss, Kuala Lumpur. C

By a letter dated 21 October 1988, the Employee had been suspended from duties for a period of two weeks pending investigations into an allegation that he had, on 15 October 1988 at about 3.30am at the employee's brewery compound, committed the offence of attempted theft of 30 bottles of Fraser & Neave ('F & N') cordials and one bottle of Lion Stout. A police report was lodged at 6.40am the same day by the Employer's head guard, who alleged that he was an eyewitness to the offence charged. Some three weeks later, the Employee had been given formal notice by letter dated 31 October 1988 — signed by the Employer's personnel officer Lim Fah — that it had decided to hold a domestic enquiry to consider four charges against him, particulars whereof were set out in a charge sheet annexed thereto, and which were in the following terms: D E

(i) that on 15 October 1988 at about 4.07am, you had attempted to steal 30 bottles of F & N cordials and one bottle of Lion Stout pint out of the brewery compound by means of your car, WAQ 213;

(ii) that on 15 October 1988 at about 4.07am, you had resisted a security check by the guard by driving your car WAQ 213 away from the barrier gate, thus obstructing the security guards from doing their duty; F

(iii) that on 15 October 1988 at about 4.08am, you had wilfully driven your car WAQ 213 into an area 'prohibited for private motor vehicles after 7pm, ie from the water tank to the conwaste bins area; and G

(iv) that on 15 October 1988, you were missing from the workplace from about 4.17am to 4.43am without the permission of your superior.

The letter dated 31 October 1988 had warned the Employee that he was required to be present at the domestic enquiry — which was to be held on 4 November 1988 at 9am at the personnel officer's office — and that he should bring along with him such documentary evidence and witnesses who might assist him in his defence, and that he could be assisted by a union representative. H

On the appointed date, the hearing of the domestic enquiry commenced, ending three days later. Charged with him was his colleague one Appalasamy. The Employee did attend the domestic enquiry and was assisted by a union representative, Jaffar. He pleaded 'not guilty' to all the charges. I

The panel of enquiry ('the Panel') comprised four senior executives of the Employer. The prosecuting officer was the personnel officer, Lim Fah. A number of witnesses were called by the prosecuting officer, including the Employer's head guard, Saadon bin Hj Ahmad; security guard Abdul Ghany bin Harun and foreman Jalil bin Tahir, who said they were at the scene of the attempted theft at the material time, in the course of duty. The testimony of these witnesses seriously incriminated the Employee. Each of them was cross-examined by the Employee. There was thus ocular proof that the Employee had a case to answer on each of the charges aforesaid.

Upon his defence being called, the Employee gave his version of the facts. He alleged that the case against him had been framed because of 'unhappy incidents' involving himself on the one hand and the head guard Saadon, and the security guard Abdul Ghany on the other. He did not, however, suggest why the foreman Jalil should falsely implicate him.

In the event, the Panel found the Employee guilty of all charges.

According to the applicable domestic procedure, the Panel was the decision-making body only in so far as the issue of liability was concerned.

So far as the issue of penalties was concerned, under the applicable domestic procedure, the Panel had only powers to make recommendations to the brewery manager, JH Van Mameren, who alone had the power to impose the appropriate penalty — no doubt after taking into consideration such recommendations, without regarding them as being in any way binding.

In the event, the Panel — without inviting the Employee to make a plea in mitigation — recommended that he be dismissed with immediate effect, in view of the gravity of the offences of which he had been found guilty, particularly the offence of attempted theft. It remarked, in passing, 'no other recommendation is required'. In the case of the Employee's co-accused, Appalasamy, the Panel recommended a period of suspension without pay.

Thereafter, the brewery manager — without inviting the Employee to make a plea in mitigation — dismissed him with immediate effect by a letter dated 16 November 1988 which was in the following terms:

> sl/608/88
>
> 16 November 1988
>
> Mr Dharmalingam Ranganathan
> Pay No 238
>
> Dear Sir,
>
> *Dismissal*
>
> We refer to the domestic inquiry held on 4 November 1988. We concur with the findings of the panel of inquiry which found you guilty of committing the following charges:

(i) that on 15 October 1988 at about 4.07am, you had attempted to steal 30 bottles of F & N cordials and one bottle of Lion Stout pint out of the brewery compound by means of your car, WAQ 213;

(ii) that on 15 October 1988 at about 4.07am, you had resisted a security check by the guard by driving your car WAQ 213 away from the barrier gate, thus obstructing the security guards from doing their duty.

(iii) that on 15 October 1988 at about 4.08am, you had wilfully driven your car WAQ 213 into an area 'prohibited for private motor vehicles after 7pm', ie from the water tank to the conwaste bins area; and

(iv) that on 15 October 1988, you were missing from the workplace from about 4.17am to 4.43am without the permission of your superior.

The charges proved against you at the inquiry being of a very serious nature, the punishment warranted is that of dismissal.

The company has therefore decided to dismiss you from service accordingly with effect from the date of this letter.

Any money due to you will be released upon obtaining clearance from the Income Tax Department in accordance with the provision of s 83(5) of the Income Tax Act 1967.

Kindly arrange to return all properties belonging to the company.

Yours faithfully,
Malayan Breweries (M) Sdn Bhd

Sgd
(JH Van Mameren)
Brewery Manager

In the event, the Employee caused to be issued in the High Court at Kuala Lumpur (Appellate and Special Powers Division) against the Employer a writ claiming, inter alia, a declaration that his dismissal from service as a wort cooler operator was in breach of the rules of natural justice.

However, at the conclusion of the hearing, the learned trial judge held that the Employer had done all that was necessary to ensure a fair hearing at the enquiry and that therefore, there was no breach of the principles of natural justice. His Lordship therefore dismissed the action with costs.

Broadly stated, before us, the dominant question of law which arose for decision in this appeal was: whether a contractual servant who is an 'employee' within the meaning of the Employment Act 1955 ('the Act') would be entitled to have his dismissal declared null, void and of no effect if procedural safeguards provided by the law had not been observed at a pre-dismissal inquiry at the domestic level?

Speaking generally, where the relationship is that of master and servant, we are normally in the field of the common law of contract, and so, the principles of administrative law — which, of course, must include the fundamental rule of natural justice expressed in the Latin maxim *audi alteram partem* (hear the other side) — would not apply. On the other hand, where the employment is in the public sector, or where statutory or other protection is conferred, procedural safeguards will have to be observed.

A And, so far as remedies are concerned, at common law, in an ordinary master and servant relationship where wrongful dismissal is established, relief will not be by way of an order for reinstatement but by way of an award of damages.

In *Ridge v Baldwin & Ors* [1964] AC 40, the Chief Constable of
B Brighton, Ridge had been tried for conspiring to corrupt the course of justice but was acquitted. Thereafter, arising out of certain derogatory remarks passed by the trial judge against Ridge when acquitting after a lengthy trial, the Watch Committee — acting under s 191(4) of the Municipal Corporations Act 1882, which empowered them to dismiss any constable 'whom they think negligent in the exercise of their duty' —
C dismissed him from his office. Ridge was not present at their meeting; nor was he given notice of the proposal to dismiss him, particulars of the grounds on which it was based or an opportunity of stating his case. The Court of Appeal, relying on the Privy Council case of *Nakkuda Ali v MF de S Jayaratne* [1951] AC 66, held that the committee was only acting in
D an administrative capacity; but on further appeal to the House of Lords, their Lordships of the House disagreed. Their Lordships of the House concluded that as the committee had not observed the rules of natural justice, its decision was void.

In referring to the right to be heard before being dismissed, Lord
E Reid distinguished three types of cases, namely: (i) dismissal of a servant by his master; (ii) dismissal from an office held during pleasure; and (iii) dismissal from an office where there must be something against a man to warrant a dismissal.

So far as (i) was concerned, Lord Reid said (at p 65):

F > The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant
G in his own defence: it depends on whether the facts emerging at the trial prove breach of contract.

But then he added (at the same page):

> But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the
H kind of contract which it can make with its servants, or the grounds on which it can dismiss them.

So far as (ii) is concerned, to say that an office is held during pleasure means that the person empowered to dismiss need not have anything against the officer, so he need not give any reason.

I Lord Reid concluded that *Ridge*'s case did not come within (i), as a chief constable is not the servant of anyone; nor, for that matter, did it fall within (ii) as the statute only permitted the Watch Committee to remove him only on the ground of negligence or unfitness. In the result, *Ridge*'s case came within (iii), and in such cases Lord Reid said (at p 66):

> ... I find an unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation.

In *Malloch v Aberdeen Corp* [1971] 1 WLR 1578, Malloch, a schoolteacher, had been dismissed from his job without having been given a hearing. The House of Lords held that if Malloch's status had been governed solely by common law instead of one holding public office during pleasure (Lord Reid's second classification in *Ridge v Baldwin & Ors*), he would not have been entitled to a hearing. However, by a statute of 1882 it was provided that no resolution for the dismissal of such a teacher was to be valid unless notice of motion for his dismissal had been sent to the teacher not less than three weeks before the meeting, and unless the resolution to dismiss had been agreed to by a majority of all the members of the body concerned. The legal position of Malloch was that his common law position was thus 'fortified by statute' and that it was implicit in that provision that he was entitled to be heard. His dismissal was quashed.

Lord Reid made the observation that an elected public body is in a very different position from that of a private employer. He pointed out (at p 1582) that although many of its servants in the lower grade are in the same position as servants of a private employer:

> ... many in higher grades or 'offices' are given special statutory status or protection. The right of a man to be heard in his own defence is the most elementary protection of all and where a statutory form of protection would be less effective if it did not carry with it a right to be heard, I would not find it difficult to imply this right.

Lord Wilberforce — while recognizing that the principle that a person holding office at pleasure has no right to be heard was not to be whittled down — added that the right to be heard is so important that that principle should not prevent the courts from examining the framework of the employment to see whether that right existed.

Indeed, Lord Wilberforce pointed out that even a contractual servant may challenge his dismissal if statutory safeguards were not observed. His Lordship said he would not follow *Vidyodaya University of Ceylon & Ors v Silva* [1964] 3 All ER 865 (where the court did not intervene in the dismissal of a professor) in so far as it involved a denial of any remedies of administrative law to analogous employments. His Lordship observed (at p 1595G–H):

> A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of the rules of natural justice, according to the master and servant test, looks illogical and even bizarre. A specialist surgeon is denied protection which is given to a hospital doctor; a university professor, as a servant has been denied the right to be heard, a dock labourer and an undergraduate have been granted it; examples can be multiplied ...

Before us, the decision of the High Court dismissing the Employee's suit was attacked on a number of grounds; but in the end, counsel for the Employee confined his contention to one ground only; namely, that before

A the punishment of dismissal was imposed on the Employee, the latter had not been accorded the opportunity of making a submission in mitigation, and that accordingly, there had been a breach of the principle of natural justice expressed in the Latin maxim *audi alteram partem*.

As regards protection against dismissal, office holders and occupants B of statutory positions have greater security of tenure — firstly, because the law implies a right to natural justice; and secondly, because a declaration might issue that the dismissal was void. (See, eg, *Ridge v Baldwin & Ors* [1964] AC 40; *Malloch v Aberdeen Corp* [1971] 1 WLR 1578 and *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141). Most importantly, in considering the question whether there is a right to a C hearing, the crucial question is whether a statutory or other requirement provides or is to be interpreted as providing the elementary safeguard of the right to a hearing. (See, eg, *Stevenson v United Road Transport Union* [1977] 2 All ER 941 (CA); *Yates v Lancashire County Council* (1974) 10 ITR 20 (police); *Breen v Amalgamated Engineering Union & Ors* [1971] 2 D QB 175 (trade union office holder) and *102 Social Club and Institute Ltd v Bickerton* (1977) ICR 911 (club)).

A further consideration as regards the question of the right to a hearing under the rules of natural justice or fairness is to be found in the law of unfair dismissal introduced by the Industrial Relations Act 1967. A workman within the Act who has been dismissed may commence E proceedings thereunder for the purpose of establishing that he has been unfairly dismissed. In such proceedings, the onus will be on an employer to prove that the dismissal was, in all the circumstances, reasonable.

The reasonableness of the dismissal may well depend on the procedure followed. In this context, it is pertinent to point out that art 42 of the Code F of Conduct of Industrial Harmony ('the Code') — jointly agreed upon on 9 February 1975 by the Malaysian Council of Employers' Organisation and the Malaysian Trades Union Congress, with the approval of the Minister for Labour and Manpower — provides, inter alia, for pre-dismissal inquiry with the right to be informed in writing of the misconduct alleged, G an opportunity given to the Employee to state his case, the right to be represented by his workers' representative or trade union official and where appropriate, a right of appeal.

The resemblance between the requirements of art 42 and the requirements of natural justice is striking. It is noteworthy that s 30(5A) of the Industrial Relations Act 1967 authorizes the Industrial Court, in H making an award, to take into consideration the requirements of the Code. However, these requirements are not absolute and so, there will be cases where it is clear that there would be no point in observing the pre-dismissal procedure. On the other hand, the case of *Khanum v Mid-Glamorgan Area Health Authority* [1979] ICR 40 (club) showed that where the Employer I has observed an agreed disciplinary procedure, it will be difficult to hold that the dismissal was procedurally unfair.

To return to the submission of counsel for the Employee before us, he relied heavily on the provisions of s 14(1) of the Act, which says this:

14(1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry — A

(a) dismiss without notice the employee;

(b) downgrade the employee; or

(c) impose any other lesser punishment as he deems just and fit. B

As we have already indicated in the present case, it was common ground that a domestic inquiry had been held, but counsel stressed that there could be no 'due inquiry' within the meaning of s 14 when, as here, the Employee, a workman within the Act, had been denied the opportunity of addressing in mitigation. C

We accept that this was a master and servant relationship case, but as we have already remarked, the crucial question is whether a statutory or other requirement provides or can be interpreted as providing the elementary safeguard of the right to a hearing. As Lord Wilberforce in the case of *Malloch* (at pp 1595H and 1596A–B) rightly said: D

> One may accept that if there are relationships in which all requirements of the observance of the rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called 'pure master and servant cases', which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of E protection. If any of these elements exist then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential requirements to be observed, and failure to observe them may result in a dismissal being declared to be void.

F

In *R v BBC ex p Lavelle* [1982] 11 IRLR 404, Woolf J indicated — albeit obiter — that when there is a procedure for dismissal in an employment not covered by statute at all, employers must comply with that procedure for the dismissal to be valid. If the contractual procedure was infringed, an injunction should issue to prevent the dismissal. This view was partly based on the notion that employment protection legislation had substantially G changed the position at common law, so that 'the ordinary contract between master and servant now has many of the attributes of an office'.

In the present case, there is a statutory requirement — to wit, s 14(1) of the Act — providing for the elementary safeguard of the right to 'due inquiry' by the Employer. It follows that — at least, prima facie — a H dismissal in breach of s 14(1) would be void.

We are aware of the (then) Supreme Court decision in *Dreamland Corp (M) Sdn Bhd v Choong Chin Sooi & Anor* [1988] 1 MLJ 111, which held that failure by an employer to hold a pre-dismissal enquiry could be cured by the hearing before the Industrial Court. I

Two points are significant in *Dreamland*'s case: first, the court was considering the case of a workman who was in receipt of an income of more than RM1,250 per month and therefore, *not* an employee within the meaning of the Act; and secondly, counsel on both sides had stood on

common ground that the dismissal was justified. The only issues for decision were jurisdictional: (i) whether the Industrial Court had jurisdiction to award compensation to a workman whose dismissal had been upheld by the court; and (ii) whether the Industrial Court had jurisdiction to amend the date of dismissal so that the workman was deemed to be in the employment until the date of the award and thereby became entitled to backwages.

It follows that *Dreamland* was a case where it was *not* open to the workman to rely on a statutory or other requirement which provided or could be interpreted as providing the elementary safeguard of the right to a hearing. *Dreamland* is, therefore, readily distinguishable on the facts from the present case.

Similarly, the Supreme Court decision in *Wong Yuen Hock v Sykt Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753 — which endorsed *Dreamland* — also concerned an employee in receipt of an income of more than RM1,250 per month and therefore, not an employee within the meaning of the Act. It was thus not open to him to rely upon the statutory right to a pre-dismissal hearing. *Hong Leong* is, therefore, also readily distinguishable on the facts from the present case.

We note in passing the interesting and well-researched article by Prof V Anantaraman entitled 'Procedural Fairness in Dismissal Proceedings in Malaysia' [1996] 2 MLJ cxiii, wherein he concluded that (at p cxxvi):

> ... the decisions of the apex courts both in *Dreamland* and *Hong Leong Assurance* notwithstanding — it may not be far wrong to conclude that the case law governing procedural rectitude in dismissal for misconduct is in a state of flux in Malaysia.

Having said that, we must add that when, as here, a claimant *is* an employee within the meaning of the Act, he has — by s 14(1) thereof — a statutory right to 'due enquiry' by his employer, and so, the approach of the Industrial Court — or, for that matter, the High Court — in considering the question whether the claimant had been dismissed without just cause or excuse would be to examine the decision not just for substance but for process as well.

It is not for this court to speculate what reasons of policy lay behind the decision of Parliament to impose monetary limits as regards salary of a workman to qualify for the right of 'due enquiry' under s 14(1). An obvious consequence of monetary limits would be to give to the poorer and more deserving categories of workmen in receipt of incomes of less than RM1,250 per month a statutory safeguard against arbitrary dismissal.

Having decided that the Employee was entitled to the elementary safeguard of the right to a hearing at the domestic proceedings, by reason of s 14(1) of the Act, we must now direct our attention to the question of critical substance; was there a partial denial of the Employee's right to 'due inquiry' when he was denied the opportunity to make a plea in mitigation before the domestic body? In our view, there was. The case of *Siggs and Chapman (Contractors) Ltd v Knight* [1984] 13 IRLR 83 shows that an employee should have the opportunity to present arguments not only on 'liability' but also in mitigation of penalty.

The next question to be considered is: what was the legal effect of the Employee having been denied the right to make a plea in mitigation? A

We are prepared to accept as a tenable proposition that, speaking generally, where misconduct has been proven, different employers might react differently. To quote Ackner LJ in *British Leyland UK Ltd v Swift* [1981] 10 IRLR 91 at p 93: B

> An employer might reasonably take the view, if the circumstances so justified, that his attitude must be a firm and definite one and must involve dismissal in order to deter other employees from like conduct. Another employer might quite reasonably on compassionate grounds treat the case as special.

We have already said that before the domestic body the employee faced four charges, which included a charge of attempted theft. The other charges related to offences committed in the course of the alleged attempted theft. There can be no room for doubt that the acts of misconduct alleged against the Employee were of a grave and weighty nature. C

Mr Michael Ong, one of the Panel members, had testified that the punishment of dismissal was in accordance with the Employer's disciplinary sheet, wherein were set out a list of serious offences and attempted theft was such an offence. In the words of Mr Ong: D

> We based our recommendation on the company's disciplinary sheet. Each employee who joined the company before 1 March 1983 was given a copy of the sheet. E

The Employee must therefore have been fully aware that if found guilty, he would be dismissed and indeed, the learned trial judge so found.

In these circumstances, did the fact that the Employee had been denied the opportunity of being heard in mitigation vitiate his dismissal? In considering this question, we shall now refer to some of the cases which we consider are pertinent. F

In *General Medical Council v Spackman* [1943] AC 627, Lord Wright said (at pp 644–645):

> If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial if the same decision would have been arrived at in the absence of the departure from the essential principles of justice. G

But, this laudable principle has been watered down in later cases, to some of which we shall now refer.

In *Ridge v Baldwin & Ors* [1964] AC 40, it was argued that the case against Ridge was so clear that nothing he could have said would have made any difference, that is to say, that what he did warranted dismissal. Lord Reid considered that that was a very doubtful excuse, but in any case failed on the facts. H

In *Malloch v Aberdeen Corp* [1971] 1 WLR 1578, the defendants had contended that the hearing would have been 'a useless formality' as they were in any event bound to have dismissed Malloch as he did not possess the qualifications required by law. However, the House of Lords held that that was arguable. I

A On the other hand, 'the useless formality' argument has prevailed in some cases.

In *Glynn v Keele University & Anor* [1971] 2 All ER 89, where a student had been disciplined, the court held that the failure to give a hearing was a breach of the rules of natural justice, but declined relief on B the ground that nothing the student could have said could have affected the disciplinary decision which was — so that court thought — 'intrinsically a perfectly proper one', having regard to the student's behaviour.

In *Ward v Bradford Corp & Ors* (1972) 70 LGR 27, a trainee teacher had permitted a man in her room in the hall of residence, contrary to regulations. There was a hearing which ended in her expulsion. The Court C of Appeal conceded that the hearing had been defective in several respects, but declined to intervene. In commenting on the student's behaviour, Lord Denning observed:

> That is a fine example to set to others ... I expect the governors and staff all thought she was quite an unsuitable person for (teaching). She would never D make a teacher.

In the present case, we are not concerned with a flawed decision on the issue of liability, but an impugned pronouncement as regards punishment only.

We would repeat that 'due inquiry', for purposes of s 14 of the Act, E includes the right to make representations against the punishment proposed as a result of adverse findings by a domestic body.

More particularly, we accept that any *discretion* as to punishment to be visited on the affected party *in itself* should preclude relaxation of the requirement of a fair hearing, which includes being afforded the opportunity F to make a plea in mitigation.

It follows that different considerations will arise if statutory or contractual provisions require in clear terms that a specified punishment is to be mandatory sequel upon proof of a given state of affairs. In such a situation, denial of an opportunity to be heard would seem to occasion no G prejudice to the affected party since the employer would have no discretion but to dismiss. The same considerations should apply if the misconduct alleged is, by its very nature, so grave as to be obviously unpardonable. As was well put by Lord Wilberforce in *Malloch v Aberdeen Corp* [1971] 1 WLR 1578 at p 1595C: 'The court does not act in vain.'

H In the present case, the misconduct proved against the Employee was very grave indeed, involving the element of dishonesty and a high degree of premeditation and preparation. The Employee must have been aware that in the event of an adverse finding on the issue of liability, dismissal would be a mandatory sequel. Indeed, no other punishment was possible, given the circumstances of the case.

I It follows that it would have been a useless formality to have accorded the Employee the right to make a plea in mitigation as the penalty would have been the same even if that right had been exercised.

In the result, we have arrived at the inevitable conclusion that this appeal must be, and is, dismissed.

As much time has been expended in considering questions of law which we had decided in favour of the Employee — although ultimately, on the facts, we have found in favour of the Employer — we make no order as to costs. The deposit paid into court by way of security for costs must be refunded.

Order accordingly.

Reported by Loo Lai Mee